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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Interconnection Between Local Exchange)
Carriers and Commercial Mobile Radio Ser-)
vice Providers)

CC Docket No. 95-185

To: The Commission

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COMMENTS

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SUMMARY

The Telecommunications Act of 1996 eliminates any statutory basis for the FCC to impose the “bill and keep” and preemption proposals set forth in the *NPRM*. New Sections 251 and 252 address the issue of interconnection comprehensively. Congress assured incumbent LECs (“ILECs”) and telecommunications carriers (including CMRS providers) the right to negotiate voluntary interconnection agreements. The 1996 Act places few limits on the terms and conditions on which parties may agree. As a result, the Commission may not adopt policies that will interfere with parties’ ability to negotiate mutually acceptable interconnection agreements. Moreover, the 1996 Act provides that State regulators are responsible for reviewing interconnection agreements. Thus, the Commission’s “bill and keep” proposal and its proposal to preempt state regulation of interconnection in the *NPRM* is not valid.

The proposed “bill and keep” policy is not only unlawful under the 1996 Act, but would also constitute an unconstitutional taking of private property for public use without just compensation. In BellSouth’s experience, ILEC-CMRS traffic is highly disproportionate. Thus, an FCC-imposed “bill and keep” policy would unlawfully require ILECs to dedicate their property to the termination of CMRS traffic without compensation.

The “bill and keep” proposal is flawed in other respects. First, the existing interconnection policy, like the 1996 Act, relied principally upon privately negotiated interconnection agreements. This policy worked well—the CMRS industry has grown rapidly for over a decade, serving over 25 million customers—and there is no need to replace it with “bill and keep.” There is simply no valid factual or policy basis for the Commission to impose a “bill and keep” requirement, even as an interim measure. More importantly, “bill and keep” is poor public policy, which would ultimately result in subsidization of competitive CMRS services by landline ratepayers, to the detriment of universal service, and would distort marketplace incentives and result in economic inefficiencies, contrary to the public interest.

The 1996 Act makes clear that the FCC may not preempt state regulation of the compensation arrangements for ILEC-CMRS interconnection. Section 201 does not support the preemption of such state regulation, to the extent it relates to intrastate interconnection charges, in light of the *Louisiana PSC v. FCC* case. Moreover, Section 332 permits preemption of state regulation only regarding the rates charged *by* CMRS providers, not the rates charged *to* them, as the Commission has previously recognized.

Finally, there is no need for any regulatory intervention concerning CMRS-IXC access arrangements that utilize ILEC facilities at this time. CMRS providers and IXCs have the alternative of utilizing dedicated access arrangements (leased lines or microwave), should they desire to do so.

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To: The Commission

COMMENTS

BellSouth Corporation, by its attorneys, hereby submits its comments on the Commission's *Notice of Proposed Rulemaking*, FCC 95-505 (Jan. 11, 1996), *summarized*, 61 Fed. Reg. 3644 (Feb. 1, 1996) (*NPRM*) and *Order and Supplemental Notice of Proposed Rulemaking*, FCC 96-61 (Feb. 16, 1996), *summarized*, 61 Fed. Reg. 6961 (Feb. 23, 1996) (*SNPRM*).

The Telecommunications Act of 1996 (the "1996 Act")¹ has eliminated any statutory basis for the Commission's "bill and keep" and preemption proposals concerning the compensation for commercial mobile radio service ("CMRS") interconnection with incumbent local exchange carriers ("ILECs"). New Sections 251 and 252 address the issue of interconnection comprehensively. Congress expressly provided ILECs and telecommunications carriers with the right to negotiate voluntary interconnection agreements. The 1996 Act sets guidelines for such negotiations, but it places very few limits on the terms and conditions on which parties may agree. As a result, the Commission may not adopt rules and policies that will interfere with parties' ability to negotiate mutually acceptable interconnection agreements. Moreover, the 1996 Act provides that State

¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996).

regulators are responsible for reviewing interconnection agreements. Thus, the Commission's "bill and keep" proposal and its proposal to preempt state regulation of interconnection is not valid.

I. GENERAL COMMENTS: THE 1996 ACT PRECLUDES ADOPTION OF THE PROPOSED “BILL AND KEEP” AND PREEMPTION POLICIES

The Commission commenced this proceeding to establish policies to govern the interconnection of CMRS providers with local exchange carrier (“LEC”) facilities. Shortly after issuance of the *NPRM*, the 1996 Act became law—the most dramatic overhaul of the nation’s telecommunications laws in over sixty years. The 1996 Act establishes a new and comprehensive framework for the interconnection of telecommunications carriers, including CMRS providers, with ILEC facilities. In recognition of the fact that this major statutory change “may have an impact on this proceeding,” the Commission issued its *SNPRM*, inviting the public to address the effect of the 1996 Act on the LEC-CMRS interconnection and jurisdictional proposals in the *NPRM*.² As BellSouth shows in the following sections, the new statutory framework for interconnection precludes adoption of the “bill and keep” and preemption proposals set forth in the *NPRM*.

² *SNPRM* at ¶ 6.

A. The 1996 Act Establishes an Explicit Interconnection Model Based on Voluntary Negotiations

The 1996 Act adds new Sections 251 and 252 to the Communications Act, establishing what Congress called a “new model for interconnection.”³ These sections set forth the rights, duties, and obligations of “telecommunications carriers” and both new and incumbent LECs,⁴ without respect to the interstate or intrastate nature of such interconnections. The touchstone of interconnection between ILECs and telecommunications carriers under the 1996 Act is reliance on voluntary negotiations to set the terms and conditions of interconnection.

Under the statute, CMRS providers constitute “telecommunications carriers.”⁵ A telecommunications carrier is defined to mean “any provider of telecommunications services,” other than aggregators. “Telecommunications service” includes “the offering of telecommunications for a fee directly to the public,” where “telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *See* 47 U.S.C. § 153.

The statute expressly designates specific circumstances under which particular classes of carriers are subject to particular interconnection duties and obligations. With respect to ILECs and telecommunications carriers, the statute establishes voluntary negotiations as the principal means for establishing the terms and conditions for interconnection. State regulators may be invited to mediate these negotiations or to arbitrate after negotiations have broken down. The statute also

³ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 121 (1996) (“Conference Report”).

⁴ The 1996 Act defines “local exchange carrier” to mean “any person that is engaged in the provision of telephone exchange service or exchange access,” but excludes CMRS providers, unless the Commission finds they should be included. 47 U.S.C. § 153.

⁵ *See* Conference Report at 114.

establishes a carefully constructed division of responsibility among the FCC and State commissions with respect to both policymaking and regulatory consideration of interconnection arrangements.

The 1996 Act establishes three tiers of interconnection obligations covering telecommunications carriers, LECs, and ILECs. All telecommunications carriers have a general duty, under Section 251(a)(1), to interconnect with other telecommunications carriers.⁶ All LECs, both new and incumbent, are subject to five additional obligations under Section 251(b): they are to permit resale, provide number portability, provide dialing parity, afford access to rights-of-way, and establish reciprocal compensation arrangements for transport and termination of traffic. Finally, ILECs⁷ are subject to six further obligations under Section 251(c): they are to negotiate interconnection terms with a requesting carrier, satisfy specific interconnection requirements, provide unbundled access, provide service at wholesale rates for resale, provide notice of changes, and make collocation available.

In the 1996 Act, Section 252 makes negotiations the principal procedure for the establishment of ILEC interconnection terms. Telecommunications carriers (including CMRS providers) and ILECs have the unequivocal right to enter into voluntary negotiations to reach mutually acceptable interconnection agreements, and all parties are obliged to negotiate in good faith. To encourage prompt and successful negotiations, the statute gives the parties great flexibility as to the terms they may incorporate into voluntary agreements. Moreover, the statute gives negotiating parties access

⁶ Section 251(a)(2) also imposes on telecommunications carriers the obligation to comply with FCC standards concerning interconnectivity and access by disabled persons.

⁷ "Incumbent local exchange carriers" include those local exchange carriers providing telephone exchange service on the date of enactment who were deemed members of the National Exchange Carriers Association, or their successors and assigns; in addition, the Commission may, under specified circumstances, classify other LECs as ILECs. *See* § 251(h). Under § 251(f), certain rural telephone companies may be exempted from the interconnection obligations of ILECs.

to mediation by a State commission and provides for compulsory arbitration by a State commission if unresolved issues remain after negotiation. All interconnection agreements⁸ must be filed with State commissions and may be rejected if they do not meet the standards specified in the statute; they are to be made available to the public within 10 days after approval or acceptance. The interconnection, services, and network elements in such agreements must be made available to other telecommunications carriers on the same terms and conditions.

It is central to the scheme established by Congress in Sections 251 and 252 that the terms of telecommunications carriers' interconnection arrangements with ILECs should be freely negotiable to the maximum extent possible, rather than determined by regulators. Congress expressly stated in Section 251(c)(1) that both the ILEC and the requesting telecommunications carrier have the duty to negotiate the terms and conditions of an agreement concerning how to fulfill the interconnection duties set forth in Section 251(b)(1)-(5) and 251(c)(2)-(6). Section 252(a)(1) states that voluntarily negotiated interconnection agreements may be reached "without regard to the standards set forth in subsections (b) and (c) of section 251." Accordingly, these are negotiable, rather than mandatory, stand-alone requirements for every agreement.

Thus, with respect to ILEC-CMRS interconnection arrangements, the specific provisions of Section 251(b) and (c) come into play only if the negotiating parties fail to reach an agreement and call upon state regulators for compulsory arbitration of open issues. Even then, the State commission may arbitrate *only* the contested issue. *See* § 252(b)(4), (c). Under Section 252(e), voluntarily negotiated ILEC interconnection agreements are to be approved by State commissions (or the FCC if a State commission fails to act) unless they are discriminatory or inconsistent with

⁸ In addition, the statute permits Bell Operating Companies to file statements of generally available interconnection terms in a tariff-like form. *See* § 252(f).

the public interest. The standards set forth in Section 251 apply only to those portions of interconnection agreements that are adopted through compulsory arbitration. *See* § 252(e)(2)(B).

B. The 1996 Act Allocates Principal Responsibility for Carrying Out the Statutory Interconnection Policy to State Commissions

Sections 251 and 252 carefully delineate the responsibilities of the FCC and State commissions with respect to interconnection and certain access arrangements involving ILECs. In general, the states are given jurisdiction over *local* exchange and exchange access arrangements between ILECs and telecommunications carriers. *See* §§ 251(d)(3), 252(e). Conversely, the FCC retains authority over predominately interstate activities, such as exchange access by interexchange carriers (“IXCs”). *See* § 251(g).

The 1996 Act reserves to the states the power to engage in general interconnection policymaking, while granting the FCC the responsibility for implementing the statute itself.⁹ Most significantly, Section 251(d)(3) provides that the FCC “shall not preclude the enforcement of any regulation, order, or policy of a State commission” that:

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.¹⁰

Similarly, Section 252(e)(3) provides that a State commission may “establish[] or enforc[e] other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.” In contrast, Section 251 gives the FCC responsibility for conducting rulemakings to implement the Congressional policy determinations in the new statute¹¹ and preserves the FCC’s Section 201 authority over interstate

⁹ *See* § 251(d)(1), (2); *see also* § 251(b)(2), (c)(4)(B), (d)(2), (e)(1), (e)(2), (g).

¹⁰ § 251(d)(3)(A)-(C).

¹¹ *See, e.g.,* § 251(b)(1) (number portability).

communications.¹² Neither Section 251 nor Section 252, however, grants the FCC authority to adopt *general* rules or policies concerning telecommunications carriers' interconnection arrangements with ILECs.

Congress divided responsibility among the FCC and State commissions for addressing the terms and conditions of ILEC interconnection agreements in a very specific way. State commissions are responsible for:

- application of FCC regulations with respect to limiting the resale of service that an ILEC makes available at retail only to a specific category or subscribers (§ 251(c)(4)(B));
- determining whether to exempt rural telephone companies from the interconnection obligations imposed on ILECs (§ 251(f));
- participating in interconnection negotiations at the request of a party to mediate differences (§ 252(a)(2));
- conducting mandatory arbitration proceedings concerning unresolved interconnection negotiations, including application of the Section 251 standards and the FCC implementing rules; establishment of just and reasonable rates, terms, and conditions in connection therewith; establishment of the charges for transport and termination of traffic; and the determination of the wholesale rates to be made available to resellers (§ 252(b)-(d));
- review of negotiated ILEC interconnection agreements (§ 252(e)); and
- review of Bell Operating Company ("BOC") statements of generally available interconnection terms (§ 252(f)).

State commission decisions approving or disapproving ILEC interconnection agreements are subject to review in federal district courts. The FCC must assume a State commission's responsibility if the State commission fails to carry out its Section 252 obligations. *See* § 252(e)(5).

¹² § 251(i).

C. The 1996 Act Precludes FCC Adoption of "Bill and Keep"

In the *NPRM*, the Commission proposed to adopt an interim "bill and keep" policy for interconnection compensation, pursuant to which the ILEC and CMRS provider would each bill its own customers for originating traffic and would not charge the other carrier for terminating traffic originated by the other carrier's customers. Adoption of the FCC's "bill and keep" proposal even as a "guideline" or "model," much less a mandatory feature of interconnection agreements, would be directly contrary to the comprehensive scheme contained in the 1996 Act, to the extent it affects ILEC interconnection arrangements.

In the 1996 Act, Congress established that the terms and conditions of interconnection between ILECs and telecommunications carriers, including CMRS providers, were to be set through voluntary negotiations. Congress specifically exempted voluntary interconnection agreements from any standards concerning compensation, rates or charges, save only that such agreements may not discriminate against nonparties.

The 1996 Act makes clear that compensation arrangements for ILEC-CMRS interconnection are to be addressed exclusively at the state, not federal, level. Section 252(d)(2)(B)(i) specifically addresses *state* authority with respect to "bill and keep" type arrangements, in the event negotiations break down and arbitration is needed. Subsection (d) makes reciprocal compensation for network usage based upon the recovery of costs plus a reasonable return the touchstone for state decision-making. Under subsection (d)(2)(B)(i), however, a state may attempt to achieve "the mutual recovery of costs through the offsetting of reciprocal obligations," including through "arrangements that waive mutual recovery (such as bill-and-keep arrangements)."

Thus, Congress has specifically preempted federal imposition of "bill and keep" policies with regard to ILEC-CMRS interconnection arrangements. Moreover, Section 251(d)(3) specifically

reserves to the states the right to adopt rules and policies that establish access and interconnection obligations of LECs, provided the state's rules and policies are consistent with the statute and do not substantially prevent implementation of it, and the FCC may not preclude the enforcement of such policies. In addition, any appeal of a State commission decision approving or disapproving an interconnection agreement goes directly to the federal district court, not the FCC. *See* § 252(e)(6).

In contrast, the 1996 Act does not give the FCC authority to supplement the statutory requirements for voluntary interconnection agreements. Indeed, the FCC's adoption of "bill and keep" policies would inhibit the voluntary interconnection negotiations that Congress intended to foster. When Congress establishes a comprehensive scheme of regulation by statute and provides no general grant of rulemaking power, the implementing agency does not have the authority to adopt substantive rules that supplement, or deviate from, the regulatory scheme established in the statute.¹³ This is particularly the case here, where Congress has decided that parties should be free within very broad limits to decide on interconnection terms in voluntary private negotiations, instead of having terms imposed on them by the government.

It would be fundamentally at odds with this statute for the FCC to adopt a policy or rule that requires, or even favors, one particular compensation arrangement, either on an interim or a long-term basis, as a mandatory element of interconnection agreements or even as a model. Any such FCC action would, at a minimum, influence parties' negotiating positions, thus diminishing the likelihood of successful voluntary negotiations. Congress has decided that all of the terms and conditions for ILEC-CMRS interconnection are to be decided through negotiations between the ILEC and the CMRS provider. Accordingly, the nature of the compensation to be paid for

¹³ *American Petroleum Institute v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

interconnected traffic between ILECs and CMRS providers' networks and the means by which rate levels and costs are to be determined are matters for the parties to negotiate voluntarily.

The FCC's lack of authority to adopt a "bill and keep" policy is confirmed by the fact that the 1996 Act relies on State commissions, not the FCC, to assist parties in their negotiations and to review their agreements concerning ILEC interconnection. Congress provided for mediation by State commissions and also made compulsory arbitration by State commissions available if the parties are unable to reach agreement on particular issues. Congress also established a procedure for regulatory review of the terms and conditions of interconnection agreements by State regulators. None of the standards set by Congress for the review of voluntarily negotiated interconnection agreements permit consideration of FCC-established compensation policies.

Under Section 4(i), 47 U.S.C. § 154(i), the FCC may only adopt rules "not inconsistent with" the Communications Act. In light of the fact that the Communications Act now comprehensively governs the rights, duties, and responsibilities of ILECs and telecommunications providers with respect to interconnection, the Commission cannot adopt the LEC-CMRS interconnection rules proposed in the *NPRM*.

Moreover, Section 201(a) does not authorize the adoption of the rules proposed in the *NPRM*. Section 201 governs only the establishment of physical interconnection and does not confer any authority over the rates, terms, and conditions for intrastate interconnection. While the 1996 Act specifically preserved the FCC's authority under Section 201, *see* § 251(i), that general reservation of authority cannot be read to erase, in one fell swoop, the highly specific interconnection policy just established in Sections 251 and 252. Under the established rules of statutory

interpretation, the specific rule takes precedence over the more general rule.¹⁴ regardless of the priority of the enactment,¹⁵ and no provision of a statute will be interpreted so as to be meaningless.¹⁶ Moreover, the express intention of Congress was to establish a "new model for interconnection" at the local level.¹⁷ Interpreting the reservation of Section 201 authority to give the FCC the ability to defeat this intent would be manifestly contrary to this expressed intent of the drafters.¹⁸ If Section 201 had fully addressed LEC interconnection with telecommunications providers in a way that satisfied Congress, it would not have enacted Sections 251 and 252.¹⁹

¹⁴ See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)); *Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349, 1361 n.25 (D.C. Cir. 1988) (*TRAC*).

¹⁵ *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *TRAC*, 836 F.2d at 1361 n.25.

¹⁶ E.g., *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute. . . rather than to emasculate an entire section'") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

¹⁷ Conference Report at 121.

¹⁸ See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

¹⁹ In any event, any conflict between Section 201 and Section 251 would have to be resolved in favor of applying Section 251, given that the 1996 Act authorizes the FCC to forbear from applying Section 201 but forbids the Commission to forbear from applying the requirements of Section 251(c) at this time. 47 U.S.C. § 10(a), (d), *as added by* § 401 of the 1996 Act. Section 251(c)(1) establishes negotiations as the principal mechanism for setting the terms and conditions of interconnection. Because the FCC is obliged to apply Section 251(c) but has the discretion to forbear from applying Section 201, Section 251 must control.

D. The 1996 Act Precludes FCC Preemption

The 1996 Act precludes the FCC's proposal to preempt State regulation of the rates, terms, and conditions for ILEC-CMRS interconnection. Section 251(d)(3) specifically reserves to State commissions the authority to "establish[] access and interconnection obligations of local exchange carriers . . . consistent with the requirements of this section" that do not "materially prevent implementation of the requirements of this section and the purposes of this part." The FCC is specifically directed, when adopting and enforcing its implementing regulations, not to preclude the enforcement of any such State commission regulation, order, or policy. Thus, in essence, the 1996 Act constitutes a congressional recognition that interconnection to the local exchange is essentially a local matter.

The statute does not provide the Commission with any special or new preemptive powers. On the contrary, the statute specifically negates the FCC's ability to override state regulations that are consistent with Section 251. Accordingly, Section 251 is a further constraint on the Commission's already limited preemptive powers.²⁰

In any event, the fact that interconnections between ILECs and CMRS providers may involve both intrastate and interstate traffic does not give the FCC authority to preempt state regulation. Virtually all interconnection arrangements between ILECs and telecommunications providers are similarly jurisdictionally mixed, in that both interstate and intrastate traffic is carried over the same facilities. Section 251 governs all such interconnections without regard to the intrastate or interstate character of the traffic and it ensures that State commissions have the authority to adopt regulations that the FCC is not permitted to override. Thus, while Section 201 gives the FCC authority to order

²⁰ Nothing in the 1996 Act diminished the States' authority over the rates and charges for intrastate communications. *See* 47 U.S.C. § 152(b).

physical ILEC-CMRS interconnection for interstate traffic. Sections 251 and 252, as well as State laws and regulations consistent therewith, govern the rates, terms, and conditions of such interconnection, without regard to the interstate or intrastate nature of the traffic.

Neither Section 251 nor the definitions in Section 3 (47 U.S.C. § 153) attaches any significance to the interstate or intrastate character of telecommunications, telecommunications services, or telecommunications carriers. This differs substantially from the approach previously taken in Title II of the Communications Act in dealing with “common carriers,” because the definition of that term in Section 3 is limited to common carriers engaged in interstate or foreign communications. Moreover, neither Section 251 nor Section 252 establishes any different procedures or standards for the regulation of interstate and intrastate interconnection arrangements.

To interpret Section 201 as giving the FCC authority to depart from the approach set forth in Sections 251 and 252, merely because interstate traffic travels over a given interconnection arrangement, would render meaningless the express preservation of state regulatory authority in Sections 251 and 252, contrary to elementary principles of statutory construction.²¹

²¹ E.g., *Menasche*, 348 U.S. at 538-39.

II. COMPENSATION FOR INTERCONNECTED TRAFFIC BETWEEN LECS AND CMRS PROVIDERS' NETWORKS

A. Compensation Arrangements

1. Existing Compensation Arrangements

Currently, nearly all cellular interconnection is based on contracts freely negotiated among the parties. ILECs and CMRS providers have entered into such contracts mindful of the FCC's stated interconnection policies.²² At the same time, the FCC has also declined to preempt state regulation over the rates for purely intrastate interconnection.²³ Thus, the parties to interconnection negotiations enter into agreements that take into account both the Commission's compensation policy and the jurisdictional limits on it, as well as the policies of the relevant State commission. The rates agreed upon as part of an interconnection agreement take all of these factors into account.

In BellSouth's region, interconnection agreements are filed with the State commission (in most cases as tariffs) and, after review, are accepted. All such agreements and tariffs are publicly available. Any other CMRS carrier that wishes to take interconnection on the terms and conditions specified in one of these agreements or tariffs is fully entitled to do so on a nondiscriminatory basis.

This system of negotiated interconnection agreements, arrived at with an understanding of FCC policies, has worked well. LECs and wireless carriers alike filed comments in CC Docket 94-54 attesting to the success of this approach.²⁴

²² See *NPRM* at ¶¶ 14, 21; *Regulatory Treatment of Mobile Services*, GN Docket 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1498 (1994) (*CMRS Second Report*), *recon. in part*, 10 F.C.C.R. 7824 (1995).

²³ See *NPRM* at ¶ 20; *CMRS Second Report*, 9 F.C.C.R. at 1498.

²⁴ See, e.g., CTIA Comments at 21; McCaw Comments at 23; PCIA Comments at 11; Western Comments at 7; GTE Comments at 37-45; AT&T Comments at 12-13; RTC Comments at 8; AirTouch Comments at 12; Vanguard Comments at 21; ALLTEL Comments at 7-8; NYNEX Comments at 11-12; Bell Atlantic Comments at 13-14; Dial Page Comments at 6; PageNet Comments at 8-9; and APC Comments at 4-5.

2. General Pricing Principles

(a) *Adopt a global approach to interconnection pricing*

The pricing for ILEC-CMRS interconnection cannot be viewed in a vacuum. These rates can and will have a direct impact on other proceedings. Wireless and new wire-based telecommunications carriers will be increasingly in competition with ILECs,²⁵ a trend that the Commission has sought to encourage.²⁶ Accordingly, a more global approach would be appropriate. A common approach to the pricing of interconnection with the LEC, such as that taken in the 1996 Act, would avoid the market distortions that will inevitably occur if the Commission takes a piecemeal approach and establishes different interconnection pricing rules for different providers of telecommunications service, thereby creating diseconomies and skewing market incentives.

²⁵ See, e.g., *AT&T Challenges RHCs—Companies Ready Entry Plans for Providing New Services*, Comm. Daily, Feb. 9, 1996, at 3. The FCC has recognized that wireless services have the potential to be competitive with local exchange service since it began its cellular rulemaking in 1980. *Cellular Communications Service*, CC Docket 79-318, *Notice of Proposed Rulemaking*, 78 F.C.C.2d 984, 990 (1980). During the early 1980s, the newness of high-capacity wireless services and the cost of providing such service led the Commission to believe that wireless competition with landline would not be feasible for some time. See *Cellular Communications Service*, CC Docket 79-318, *Report and Order*, 86 F.C.C.2d 469, 484 (1981), *recon.*, 89 F.C.C.2d 58, 67 (1982) (subsequent history omitted). In 1986, just a few years after cellular service had begun, McCaw submitted a study by consultant Dale N. Hatfield to support its position that cellular systems were evolving rapidly as a landline telephone substitute for many customers, but the FCC again felt that such competition was premature. See *James F. Rill*, 60 Rad. Reg. 2d (P&F) 583, 594 & n.29, *recon.*, 61 Rad. Reg. 2d (P&F) 1129 (1986). Recently, however, the Commission has recognized that wireless services are becoming more substitutable for wireline services. See, e.g., *New Personal Communications Services*, Gen. Docket 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7705 n.11 (1993) (subsequent history omitted).

²⁶ See *Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket 96-6, *Notice of Proposed Rulemaking*, FCC 96-17 (Jan. 25, 1996) (proposing that broadband CMRS providers be authorized to offer fixed wireless local loop service).

3. Pricing Proposals (Interim, Long Term, Symmetrical)

(a) *“Bill and keep” is contrary to the 1996 Act*

For the reasons discussed more thoroughly in Section I.C, FCC adoption of the proposed “bill and keep” policy is contrary to the 1996 Act. Under this proposal, the ILEC and CMRS provider would each be obligated to terminate traffic originated by the other without charge, with the originating carrier keeping all revenues received from its customer. In the 1996 Act, however, Congress required ILECs and CMRS providers to negotiate interconnection arrangements in good faith. The statute encourages the resolution of interconnection by voluntary agreement of the parties by imposing few requirements on such agreements. FCC adoption of a “bill and keep” requirement would directly interfere with the parties’ freedom to negotiate.

Under the 1996 Act, ILECs and telecommunications carriers who enter into voluntary interconnection agreements are free to adopt virtually any compensation mechanism that is not discriminatory against nonparties to the agreement. *See* § 252(a)(1), (e)(2)(A). The nature and structure of the charges, within the parameters set by the statute, is subject to review and acceptance by State commissions, not the FCC, pursuant to Section 252(e). Accordingly, the promulgation of a “bill and keep” compensation arrangement would, on its face, violate the fundamental policy choices and specific jurisdictional allocations established by Congress in the 1996 Act.

(b) *Mandatory “bill and keep” arrangements for LEC-CMRS interconnection would be an unconstitutional “taking” without just compensation*

The Commission’s proposal to mandate “bill and keep” arrangements for LEC-CMRS interconnection on an interim (or other) basis is unconstitutional because it would amount to a taking without just compensation in violation of the Takings Clause of the Fifth Amendment.²⁷ Under the

²⁷ U.S. CONST. amend. V, provides, in relevant part: “nor shall private property be taken for public use, without just compensation.”

proposed “bill and keep” policy, a LEC would be obligated to utilize its facilities to provide transport and termination of CMRS-originated calls without receiving any compensation for allowing the CMRS-originated calls to transit its network.

Government action that requires a property owner to allow a utility to dedicate a portion of its property to use and transit by others constitutes a taking, for Fifth Amendment purposes. “Such public access would deprive [the] petitioner of the right to exclude others, ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”²⁸ Thus, even a small government-mandated physical intrusion into one’s property for the purpose of carrying public utility traffic is a taking.²⁹

The requirement that a LEC transport and terminate CMRS traffic constitutes a physical intrusion into the LEC’s property. A LEC must engineer its telephone exchange plant to accommodate the busy-hour traffic originated by CMRS providers. Because many of the facilities involved are traffic-sensitive, the traffic originated by a CMRS provider requires the LEC to make investments in physical property to accommodate such traffic in order to avoid degrading the service provided to others. When traffic is offered by the CMRS provider for termination on the LEC’s network, the LEC is obligated to devote its wires and switching facilities to the carriage of this traffic. As a result, property in the LEC’s switching offices and distribution network is physically occupied by the CMRS-originated traffic when in use to carry this traffic, and the LEC is denied the use of this property to serve others for the duration of the CMRS-originated calls. Because the LEC is obliged by the FCC’s policy to invest in physical plant in order to terminate CMRS-originated

²⁸ *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

²⁹ *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424-26 (1982).

traffic, this plant is physically occupied when traffic is offered, and the LEC is denied the ability to use this physical plant for any other purpose, a taking clearly occurs.³⁰

In *Duquesne Light Co. v. Barasch*, the Supreme Court set forth the “guiding principle” of Takings Clause law respecting public utility regulation:

[T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory. . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth . . . Amendment[.].³¹

Accordingly, if the Commission adopts a “bill and keep” requirement, it would only pass constitutional muster if the LEC receives just compensation for the deprivation of its property. With the FCC’s “bill and keep” proposal, that does not occur. The LEC receives *not one penny* in actual or imputed compensation for terminating CMRS-originated traffic, without regard to the volume of traffic offered or the investment in physical plant needed to accommodate it. While the government clearly has the authority to regulate the rates charged by public utilities, the Takings Clause does not permit it to require the dedication of facilities and the provision of service without compensation. A government-imposed “bill and keep” policy that is not based on offsetting reciprocal compensation is confiscatory and therefore violates the Takings Clause of the Fifth Amendment.

(c) *Circumstances do not warrant replacing the CMRS negotiated interconnection policy with “bill and keep”*

In addition to the legal impediments to “bill and keep” posed by the 1996 Act and Takings Clause, the proposal is unlawful because it fails to serve any legitimate purpose. The existing

³⁰ See *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1444 (D.C. Cir. 1994).

³¹ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989).

CMRS interconnection policy was a successful extension of the cellular interconnection policy, which encouraged cellular carriers and LECs to bridge their differences through negotiations.

The existing LEC-CMRS interconnection policy, like the 1996 Act, is based on the principle that the evolving competitive telecommunications marketplace should be shaped by market forces to the extent possible, and not by regulatory fiat. Intrusive regulations such as the “bill and keep” policy proposed in the *NPRM* stifle competitive responses to consumer needs and establish artificial barriers to competition and other market distortions. Even if such policies are adopted only for an “interim” period, they tend to outlive their usefulness and become difficult to eliminate even after the “interim” period.³²

The existing LEC-CMRS interconnection policies were developed over the last decade in response to market forces with a minimum of regulatory intervention. While they are not perfect, they have worked well. Before enactment of the 1996 Act, there simply was no reason to depart substantially from those highly successful policies. To be fully consistent with the 1996 Act, the Commission should now reject its “bill and keep” proposal and make clear that parties are encouraged to reach voluntary negotiated agreements on interconnection and may agree on any nondiscriminatory terms for interconnection.

³² For example, two years after the Commission’s cellular structural separation rule was adopted in 1981, the Commission said it would review whether the rule was still necessary by 1985. *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1140 (1983), *recon.*, 49 Fed. Reg. 26,056, 26,063, *aff’d sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *decision on recon. aff’d sub nom. North American Telecommunications Ass’n v. FCC*, 772 F.2d 1282 (7th Cir. 1985). The FCC never conducted that promised review, and as a result ten years later the rule remained on the books. In 1995, the Commission’s retention of the rule was held to be arbitrary and capricious. *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 767-68 (6th Cir. 1995).